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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GABRIEL RUBELL BERGERO, a Minor, etc., Plaintiff and Appellant, v. UNIVERSITY OF SOUTHERN CALIFORNIA KECK SCHOOL OF MEDICINE, Defendant and Respondent.	B200595 (Los Angeles County Super. Ct. No. BC325496)

APPEAL from a judgment of the Superior Court of Los Angeles County. Aurelio N. Munoz, Judge. Affirmed.

Cohen & Rudd and Arlan A. Cohen for Plaintiff and Appellant.

Horvitz & Levy, Lisa Perrochet and Felix Shafir; Reback, McAndrews & Kjar and Patrick E. Stockalper for Defendant and Respondent.

Cole Pedroza, Matthew S. Levinson, and Cassidy E. Cole for California Medical Association, California Dental Association, and California Hospital Association as Amici Curiae on behalf of Defendant and Respondent.

Gabriel Rubell Bergero, by and through his guardian ad litem and mother, Eve Rubell, appeals a judgment entered in favor of the University of Southern California Keck School of Medicine (USC) in Gabriel's wrongful life action. Rubell was an in vitro fertilization patient at USC. After learning that she carried the X-linked recessive genetic disorder Fabry disease, Rubell sought preimplantation genetic diagnosis to avoid implanting an embryo affected by the disease. Despite these efforts, Rubell conceived and gave birth to Gabriel, a male child with Fabry. Gabriel alleged that USC was negligent in connection with the preimplantation genetic testing and in vitro fertilization. A jury found that USC was not negligent. Gabriel contends that the trial court erred by refusing to instruct the jury on informed consent. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In 2003, Eve Rubell and her husband, Jose Bergero, had been trying unsuccessfully to have a child for several years. When artificial insemination did not work, they decided to try in vitro fertilization (IVF). The couple researched IVF specialists and decided to work with Dr. Richard Paulson at USC's Keck School of Medicine. Shortly before the couple planned to start the IVF process, Rubell had a routine eye exam. The optometrist noticed an unusual swirling pattern on Rubell's corneas. This pattern can be a sign that a person has Fabry disease—a hereditary lipid storage disorder. Additional tests revealed that Rubell was in fact a carrier for Fabry.

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1 " 'Since the only contention on appeal related to a jury instruction, "[i]n assessing an instruction's prejudicial impact, we cannot use the view of the evidence and inferences most favorable to the [prevailing party]. [Citations.] Instead, we must assume the jury might have believed [appellant's] evidence and, if properly instructed, might have decided in [appellant's] favor. [Citations.]" [Citation.] Accordingly, we state the facts most favorably to the party appealing the instructional error alleged, in accordance with the customary rule of appellate review. [Citation.]' [Citation.]" (*Galvez v. Frields* (2001) 88 Cal.App.4th 1410, 1413.)

Fabry disease causes a person to have reduced amounts of the enzyme alpha galactosidase, which prevents the buildup of lipids in cells. It is an X-linked recessive disorder, which means that it is caused by a disease on the X chromosome. Because women have two X chromosomes, the normal gene on one of the X chromosomes may allow a woman with Fabry to produce enough of the necessary enzyme to compensate for the defective gene on the affected chromosome. As a result, a woman may carry the disease and experience few symptoms. However, a woman carrying the disease may give birth to male children with a more severe form of the disorder.

From an early age, boys with Fabry may experience severe pain, particularly in their hands and feet. As they get older, men with Fabry may suffer from kidney failure, heart failure, and an increased risk of stroke. Without enzyme replacement treatment, men with Fabry disease are expected to live into their late 40's or early 50's. Although there is now an enzyme treatment that slows the progression of Fabry, there is not yet long-term data demonstrating how much the treatment will extend the life expectancy of men with the disease. According to data gathered from a national Fabry registry, 70 percent of women who carry the defective gene will need treatment, but not until they reach their late 40's or early 50's. Rubell had experienced few, if any, symptoms as a Fabry carrier.

When doctors confirmed that Rubell carried the Fabry gene, a clinical geneticist from Kaiser Permanente spoke with Rubell about her options. The geneticist told Rubell she could consider adoption, get pregnant and take her chances, or consider preimplantation genetic diagnosis (PGD). In PGD, an embryo is cultivated using IVF, then a single cell of the embryo is removed and tested for specific genetic defects. The process is intended to allow parents to avoid conceiving a child that will be born with a particular genetic disorder. The geneticist told Rubell that there were two forms of PGD—one for determining gender, and the other for detecting a disease. She also mentioned that Dr. Mark Hughes, a specialist in Michigan, had been recommended to her.

Rubell discussed the issue with Dr. Richard Paulson at USC. Paulson also told Rubell she had several options, including egg donation, adoption, trying to get pregnant without attempting to test for or eliminate Fabry, or PGD. Within PGD, Rubell had two choices: gender selection using fluorescence in situ hybridization (FISH), or polymerase chain reaction (PCR), which would attempt to diagnose which of the cultivated embryos were affected with Fabry. Paulson advised Rubell that Dr. Hughes could tell her more about the risks and benefits of PCR if she was interested in pursuing that option.

Rubell and Bergero subsequently spoke with Dr. Hughes about PGD. Hughes explained PGD and recommended PCR over FISH. Hughes told the couple that with FISH testing, or gender selection, they would have to discard all male embryos, even those not affected with Fabry. PCR would allow the couple to discard only affected embryos. Rubell understood Hughes to mean that the couple would have more embryos to implant with PCR than with FISH.[2] Hughes also told the couple that PCR had a 3 to 5 percent rate of misdiagnosis. Hughes stated that in those cases, even though everything is done correctly, the test might produce information that is not correct given the technology involved. Hughes later sent a follow-up e-mail to Rubell and Bergero in which he gave the couple instructions on how to proceed. He praised the couple's choice of USC and Dr. Paulson for the IVF portion of the procedure, stating: "I am VERY happy that you have selected [Paulson] as your doctor, because this IVF program is top-flight. Frankly, it doesn't get any better. We will work together to make things go smoothly for you." He also cautioned:

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[2] In a subsequent letter to Kaiser, Dr. Hughes explained: "While embryo sex selection could be performed for this family, with subseque[n]t transfer of female embryos to avoid the X-linked recessive disease, this is not in the best interest of this patient. Since the molecular basis of Fabry has been determined for her, testing for that mutation gives them a three-fourths chance of avoiding disease rather than just one-half, which would occur with chromosome testing."

> "Also, as we discussed, it is important that you understand that testing one cell will never, ever be as reliable as testing thousands of cells from, say, an amniocentesis sample. PGD is not 100%. In eleven years, we've had three misdiagnoses out of many hundreds of cases. And, there have been errors by programs in London, NYC, Boston and Brussels and Chicago. Our goal will be to dramatically change your odds of having a baby with Fabry from the potential risk of 25% - 50% (affected-carrier) to something much, much better than that . . . . say, 3-4%. But unfortunately, biology is not mathematics and nothing in medicine is 100%."[3]

Rubell and Bergero decided to go forward with PCR. They also wanted Kaiser to pay for the testing. Kaiser originally refused to cover the test because it considered PGD to be too new and without a proven track record. Rubell appealed the decision and asked Dr. Paulson to write a letter to support the appeal. He obliged. In a letter to Kaiser, Paulson informed the committee that USC had recently begun collaborating with Dr. Hughes to offer PGD. Paulson's letter recommended PGD because it provided the opportunity to avoid passing Fabry on to Rubell's offspring. He wrote that Rubell carried Fabry, "a potentially serious condition, and one that can be eliminated with the use of PGD," suggesting that despite PGD's "relative novelty and limited history . . . it should be utilized when ever there is an opportunity to eliminate a transmissible disease in this manner." He further indicated that his program had "had excellent success with PGD. In this regard, Dr. Hughes' laboratory is among the pre-eminent laboratories performing PGD analysis" and was Paulson's clear first choice for performing PGD.[4]

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[3] Dr. Hughes subsequently informed Dr. Paulson—before any embryos were implanted—that Rubell and Bergero had acknowledged this information.

[4] Dr. Hughes also wrote a supporting letter. Rubell read both letters.

Rubell personally appeared before a Kaiser committee to argue that the procedure should be covered. Rubell and Bergero's primary goal was to avoid conceiving a boy with Fabry disease. But in notes she wrote in preparation for her presentation to the committee, Rubell indicated that she had been advised to stop the chain of the disease and to keep it from affecting future generations. She also wrote in the notes that some patients had PGD to detect chromosomal problems or for gender selection, but that she wanted PGD for disease detection, not gender selection. Kaiser agreed to pay for the procedure.

The PCR process required several steps. First, Rubell and Bergero sent blood samples to Dr. Hughes so that he could create primers for the test. Next, Rubell went through the beginning of the IVF process. On the first day of the process at USC, Rubell and Bergero signed a three-page written consent form. The form explained the PCR procedure and included a several-paragraph section entitled "potential for failure." The form cautioned that PGD procedures were new and could possibly lead to an incorrect diagnosis, and further that laboratory experience in the field was limited and the likelihood of success could not be predicted. In addition, the form required the couple to acknowledge a nonexhaustive list of reasons PGD might fail, including possibilities such as failure of the genetic analysis to provide adequate diagnostic information, damage to the embryo during biopsy, or failure to transfer embryos back to the uterus. The couple agreed on the form that since the techniques could result in the transfer of an affected embryo, they would undergo prenatal testing to confirm the genetic analysis.

Although USC was very experienced in IVF procedures generally, it had performed IVF for PCR only one or two times before Rubell's case. Briefly, the process was as follows. Dr. Paulson collected follicular fluid containing Rubell's eggs. He passed the fluid and eggs on to an embryologist, Mary Francis. Francis located the eggs in the collected follicular fluid and stripped away the cumulus cells surrounding each egg. Francis then performed a procedure called intra cytoplasmic sperm injection (ICSI), in which she pushed one sperm into each egg. Francis

monitored each egg to determine which were fertilized and became embryos, and how they were progressing.[5] Francis cultivated six embryos. When the embryos had between six and 10 cells, another specialist, Dr. Sergei Evsikov, came to biopsy one cell from each embryo. Evsikov worked at a reproductive center in Beverly Hills and had done hundreds of single-cell biopsies for both PCR and FISH.

The biopsied cells were sent to Dr. Hughes at his PCR laboratory in Michigan. After processing and analysis, Hughes determined that *none* of the six embryos could be deemed free of Fabry. Two embryos were clearly affected with Fabry and appeared to be male. Two others did not produce results or presented only inconclusive signals. The remaining two appeared to be female Fabry carriers—there were two X chromosomes, one of which was affected.

Rubell and Bergero decided to implant the two embryos that appeared to be female Fabry carriers. A week later, Rubell learned that one embryo had successfully implanted and she was pregnant. Around 11 or 12 weeks later, Rubell went to Kaiser for an ultrasound. At the ultrasound, the technician informed her that the fetus was male. An amniocentesis confirmed that Rubell was carrying a male fetus with Fabry disease. Rubell and Bergero decided to go through with the pregnancy rather than terminating and undergoing another round of IVF and testing.

Trial

On December 6, 2004, Rubell, Bergero, and Gabriel filed an action against numerous defendants asserting medical malpractice and wrongful life claims. When the trial began in March 2007, the only remaining plaintiff was Gabriel, asserting a wrongful life claim against USC and Francis. Francis was later dismissed as an individual defendant.

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[5] Francis used a microscope when conducting these processes. She indicated at trial that the eggs and embryos cannot be seen with the naked eye.

At the trial, several experts offered conflicting testimony about the most likely explanations for the implantation of a male embryo affected with Fabry. Gabriel's medical expert, Dr. William Wilcox, opined that USC had either allowed the cells sent to Dr. Hughes to be contaminated with DNA, or that USC had mixed up the embryos or single-cell samples and implanted the wrong embryos. Wilcox testified that USC had inadequate procedures to protect against exogenous DNA contamination[6] and sample mix-up when performing IVF for PCR. Wilcox further testified that it would have been standard to test out the procedure on embryos "that aren't going to be used for anything" before offering IVF for PCR to the public, but USC did not do so. He opined that USC had violated the standard of care, causing the outcome in the case.

Defense expert Dr. John Williams opined that confined placental mosaicism was a highly probable cause of the outcome. Mosaicism is a condition in which cells contain an extra chromosome. According to Williams, studies have shown that a high percentage of preimplantation embryos are mosaic. If an abnormal cell is biopsied for PCR analysis, it might have three, rather than two, chromosomes, which would throw off the inference of gender. Although testing after Gabriel's birth did not reveal that he had any mosaic cells, Williams testified that in some cases the placenta may contain all of the abnormal cells, while the fetus has only normal cells.

Defense expert Dr. Marcelle Cedars opined that USC met the standard of care in performing IVF for PCR. Cedars testified that the most likely cause of the outcome was endogenous DNA contamination, due to the unavoidable difficulties of completely stripping all of the cumulus cells off the outside of the egg prior to ICSI. Cedars also testified that other possible reasons for the outcome were mosaicism, human error in the form of sample mix-up, or risks that are not yet understood due to

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[6] Exogenous DNA contamination occurs when foreign DNA from the embryo's environment contaminates the sample. Endogenous DNA is internal contamination and may come from the mother or father's DNA.

the "technicality of the process." She could not say which of those remaining possibilities was most likely, but stated that the risk of all error is low.

Another defense expert, Dr. Santiago Munne, also opined that cumulus cell contamination was the most likely cause of the outcome. Using a technique developed after the events of this case occurred, Munne had determined that approximately 8 percent of cells biopsied for PCR from IVF labs have cumulus cell contamination. He indicated that cumulus cell contamination can make PCR unreliable. However, he also asserted that while a percentage of cells are contaminated, not all contamination leads to a misdiagnosis. He therefore disagreed with the assertion that the 3 to 5 percent reported PCR error rate was incorrect or should be higher when DNA contamination is taken into consideration.

Both sides offered testimony about what USC did and did not do to avoid DNA contamination and sample mix-up. Gabriel presented testimony about the precautions a PCR lab takes to prevent DNA contamination and sample mix-up, including Dr. Wilcox's testimony that USC should have taken similar precautions. Defense experts and Dr. Paulson testified many of these precautions were not standard in an IVF lab, in part because an IVF lab's primary concern is growing healthy embryos that will lead to pregnancy.[7]

On sample mix-up, Gabriel elicited testimony from Dr. Munne that in 2003 among the "PGD community" there was a consensus that two people should check transfers at the time of the single-cell biopsy.[8] Dr. Cedars testified that the standard of

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[7] For example, Drs. Paulson and Cedars testified that irradiating IVF dishes and plastic tools with ultraviolet light causes them to release volatile organic compounds or other toxins that might harm the embryos.

[8] Eventually, this consensus was reported in a published article in 2004, after the events in this case had occurred. Dr. Munne's testimony not did clearly indicate whether IVF labs were a part of the "community of PGD laboratories" that would have constituted this general consensus.

care in an embryology setting did not include having two people simultaneously check samples to identify the embryo.

Although Rubell testified that Drs. Paulson and Hughes discussed the risks of misdiagnosis with PCR, and also choosing PCR instead of FISH, there was conflicting testimony about the detail of these discussions. Rubell acknowledged "skimming" the written consent form and signing it, but asserted that no one reviewed it with her verbally. According to Rubell, Paulson did not discuss any difference in the accuracy of FISH and PCR or tell her how accurate FISH testing could be in determining gender. Rubell testified that no one at USC ever told her that contamination or sample mix-up could cause a misdiagnosis. She indicated that USC did not tell her that some embryos might not yield enough information for diagnosis. She also testified that no one told her that USC had only performed one or two prior IVF for PCR procedures. She stated that Paulson's letter to Kaiser made her think that USC was experienced in IVF for PCR. Rubell recalled that Hughes discussed PCR error rates with her but did not describe all of the various sources of error. Hughes did not mention sample mix-up or contamination. Rubell understood Hughes's statements about error to mean that the lack of a chemical reaction might cause the process to fail. Rubell also said that she asked Paulson about taking two cells from the embryo for analysis, but he did not recommend it because it would negatively impact the embryo. Rubell and Bergero asserted that their top priority was to avoid conceiving a *male* child with Fabry, but Rubell did not remember if she ever made such a statement to Paulson.

According to Dr. Paulson, his first recommendation to Rubell was that she pursue egg donation. But Rubell wanted to try PGD, and Paulson understood that Rubell's primary goal was to avoid passing Fabry on to a new generation. Paulson testified that he told Rubell that PCR had an up to 10 percent risk of misdiagnosis, and that the procedure was inherently risky. Paulson said that he told the couple that preimplantation testing of the human embryo is "finicky" and not yet completely understood. Paulson testified that he also told the couple that even if the test was perfectly administered it could still give incorrect results because the rest of the

embryo might not be the same as the one biopsied cell. Paulson indicated that he discussed FISH testing with Rubell, but it would not have been appropriate because she was interested in completely eliminating the disease from her offspring. He also testified that he did not recommend taking two cells from the embryos to conduct both PCR and FISH because he felt that it would make the embryos nonviable and would prevent Rubell from becoming pregnant. Paulson conceded that he did not tell Rubell that USC had only performed IVF for PCR one or two times before. However, he also stated that USC was as experienced as any other IVF center in Los Angeles or on the West Coast at that time. He also did not consider USC to be particularly inexperienced because it was bringing in Dr. Evsikov to do the single-cell biopsy.

Informed Consent

The complaint did not specifically plead lack of informed consent as a theory of liability. However, at trial Gabriel's counsel repeatedly made arguments and pursued lines of questioning relating to an informed consent theory.[9]

When the parties offered proposed jury instructions, Gabriel requested California Civil Jury Instructions (CACI) CACI No. 532, which provides a definition of "informed consent," and No. 533: Failure to Obtain Informed Consent—Essential Factual Elements.[10] Gabriel also proposed a modified version CACI No. 513:

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[9] At one point in the trial, defense counsel disputed an objection to his questioning, arguing that the question went to the issue of informed consent. In response, the trial court stated: "[Informed consent] is not an issue in this case, counsel." When defense counsel asked for confirmation that informed consent would not be argued to the jury, the court replied, "It better not be." However, the court subsequently allowed questioning and argument relevant to the informed consent theory.

[10] CACI No. 533 instructs the jury as follows:

"[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she] performed a [*insert medical procedure*] on [*name of plaintiff*] without first obtaining [his/her] informed consent. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of defendant*] performed a [*insert medical procedure*] on [*name of plaintiff*]; [¶] 2. That [*name of plaintiff*] did not give

Wrongful Life—Essential Factual Elements. Gabriel suggested that instead of the standard CACI No. 513, the court give an instruction that allowed the jury to base liability on USC's failure to tell Gabriel's parents about the risks and benefits of other methods of PGD, USC's failure to disclose its inexperience, or USC's violation of the standard of care in either performing PGD or researching and testing the PGD protocol.

The jury instructions conference occurred off the record. In a reported proceeding the following morning, the trial court had already determined it would not instruct the jury on informed consent, but would allow the informed consent theory to be argued to the jury. In the reported conference, the court stated that the parties and the court were in agreement as to all instructions except as to be noted. USC sought to make a record and asserted that Gabriel's counsel should not be allowed to argue an informed consent theory to the jury. Gabriel's counsel argued in response and stated: "So I understand the court's position that informed consent won't be permitted to be argued as a separate cause of action. One can, in certain circumstances, argue informed consent, even if there is no negligence at the other end, simply because a bad outcome occurred. . . . [¶] . . . [¶] . . . In any case, I agree with the court's decision. I will not argue it as a separate cause of action."

[his/her] informed consent for the [*insert medical procedure*]; [¶] 3. That a reasonable person in [*name of plaintiff*]'s position would not have agreed to the [*insert medical procedure*] if he or she had been fully informed of the results and risks of [and alternatives to] the procedure; and [¶] 4. That [*name of plaintiff*] was harmed by a result or risk that [*name of defendant*] should have explained before the [*insert medical procedure*] was performed."

The record does not reflect that Gabriel's counsel proposed this instruction with any modifications, or that he submitted a completed version.

The court did not instruct on informed consent. It gave a modified version of CACI No. 513, which referred only to the alleged negligent care and treatment of Rubell.[11] Both parties raised informed consent in their closing arguments. Gabriel's counsel argued that the case was about "concealment of experience," and contended that USC was at fault for not telling Rubell and Bergero about the center's limited experience in IVF for PCR, and for not informing them that a lab in Chicago had much more experience. Defense counsel explicitly argued that Gabriel had not established lack of informed consent, asserting that he had presented no evidence suggesting that the consent USC obtained for the procedure fell below the standard of care. Defense counsel also argued that Rubell was well informed of the risks of PCR. In further argument, Gabriel's counsel described informed consent and spelled out his theories that Rubell should have had the choice to seek out a more experienced lab. He further suggested that a reasonable patient would have wanted to know that USC was inexperienced in IVF for PCR, that other labs had more experience, and that USC did not take precautions to avoid contamination or sample mix-up that were "routine" in other labs.

In an 11-1 verdict, the jury concluded that USC was not negligent. The trial court denied Gabriel's motion for a new trial. This appeal followed.

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[11] The modified version was: "Gabriel Rubell Bergero claims that USC School of Medicine was negligent in its care and treatment of his mother when she sought medical care regarding preimplantation genetic diagnosis in avoidance of the birth of a child with Fabry disease and that this [negligence] was a legal cause of the birth of a male . . . child with Fabry disease. To establish this claim, Gabriel Rubell Bergero must prove all of the following: [¶] First, that USC Keck was negligent in its care and treatment of Eve Rubell when she sought medical care regarding preimplantation genetic diagnosis of her embryos for the avoidance of the birth of a male child with Fabry disease; [¶] second, that Gabriel Rubell Bergero was born with Fabry's disease; [¶] and, third, that, if USC Keck had performed its portion of the preimplantation genetic diagnosis process in a non-negligent manner, a male child with Fabry's disease would not have been implanted in Eve Rubell; [¶] and fourth, that Gabriel Rubell Bergero will have to pay extraordinary medical expenses because he is a male with Fabry's disease."

DISCUSSION

Gabriel contends on appeal that the trial court erred by refusing to instruct the jury on failure to obtain informed consent. We find that reversal is not warranted.

I. Standard of Review

" ' "[P]arties have the 'right to have the jury instructed as to the law applicable to all their theories of the case which were supported by the pleadings and the evidence, whether or not that evidence was considered persuasive by the trial court.' [Citation.] 'A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable since the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]' [Citation.]" [Citation.]' [Citation.]" (*Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358 (*Ayala*), italics omitted.)

However, a trial court need not give an instruction if it is not supported by the pleadings and evidence in the case. (*LeMons v. Regents of the University of California* (1978) 21 Cal.3d 869, 875; *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1094-1095.)

If the trial court errs in refusing to give a requested instruction, this court will only reverse the verdict if the error is prejudicial. The error is prejudicial only if it is reasonably probable that the complaining party would have obtained a more favorable result in the absence of the error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570 (*Soule*); *Ayala, supra,* 160 Cal.App.4th at p. 1361.)

II. Waiver

USC contends that Gabriel waived any objections to the jury instructions. We disagree.

In general, if a party requests a proper jury instruction and the court refuses to give the instruction, the party is deemed to have objected. (*Green v. State of California* (2007) 42 Cal.4th 254, 266; Code Civ. Proc., § 647.) However, if a party invites the error by requesting or agreeing to an allegedly incorrect instruction—or a

refusal to instruct—that party forfeits any objection as a basis for reversal on appeal. (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 984 (*McCarty*).) The appellant bears the "burden of presenting a sufficient record to establish that the claimed error was *not* invited by [it], or be barred from complaining about it on appeal. [Citation.]" (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1091.)

Here, the record indicates that Gabriel requested CACI instructions on informed consent and modifications to the CACI wrongful life instruction that incorporated an informed consent theory. The record also reveals that the trial court refused these proposed instructions. No additional objection to the court's refusal to instruct was required. (*McCarty*, *supra*, 164 Cal.App.4th at p. 983.) The only potential invited error came from Gabriel's counsel's statement that he "agreed" with the trial court's decision not to instruct on informed consent. Although this statement by itself could be read as Gabriel abandoning his request for an informed consent instruction, the context suggests otherwise. When Gabriel's counsel made the statement, the court had already ruled and did not reconsider its rulings during the reported conference. It is therefore difficult to read counsel's statement as *inviting* an erroneous ruling. Gabriel is not estopped from appealing based on the court's refusal to instruct on informed consent.

III. Informed Consent

A claim for failure to obtain informed consent arises out of a "physician's duty to disclose to a patient information material to the decision whether to undergo treatment[.]" (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1175 (*Arato*).) In *Cobbs v. Grant* (1972) 8 Cal.3d 229, 242 (*Cobbs*), the California Supreme Court explained that the doctrine is based on four "postulates." These postulates incorporate the concept that patients generally do not have medical knowledge and rely upon their doctors for information. The doctrine also acknowledges that "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment." (*Ibid.*) To be effective, a patient's consent to treatment must be an informed consent. (*Ibid.*) And, "in soliciting

the patient's consent, a physician has a fiduciary duty to disclose all information material to the patient's decision. [Citations.]" (*Moore v. Regents of the University of California* (1990) 51 Cal.3d 120, 129.) "From these ethical imperatives, [the court] derived the obligation of a treating physician 'of reasonable disclosure of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each.' [Citation.]" (*Arato*, *supra*, 5 Cal.4th at p. 1183.)

When dealing with a complicated procedure, a doctor has a duty to disclose "the potential of death or serious harm, and to explain in lay terms the complications that might possibly occur. Beyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances. . . . [¶] The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is whatever information is material to the decision." (*Cobbs*, *supra*, 8 Cal.3d at pp. 244-245.) "Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. [Citations.] To be material, a fact must also be one which is not commonly appreciated." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291.) But a "mini-course in medical science is not required." (*Cobbs*, *supra*, 8 Cal.3d at p. 244.)[12]

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12 The California Supreme Court has refrained from concluding that any particular information must be disclosed. In *Arato*, the court explained: "Rather than mandate the disclosure of specific information as a matter of law, the better rule is to instruct the jury that a physician is under a legal duty to disclose to the patient all material information . . . needed to make an informed decision regarding a proposed treatment. . . . [¶] [W]e leave the ultimate judgment as to the factual adequacy of a challenged disclosure to the venerable American jury, operating under legal instructions such as those given here and subject to the persuasive force of trial advocacy." (*Arato*, *supra*, 5 Cal.4th at pp. 1186-1187.)

"If a doctor fails to make reasonable disclosure and a prudent person in the patient's position would have declined the procedure had disclosure been made, then the doctor may be held liable in negligence if the risks inherent in the procedure materialize. [Citation.]" (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 339 (*Mathis*); see also *Cobbs, supra,* 8 Cal.3d at pp. 240, 244-245; *Spann v. Irwin Memorial Blood Centers* (1995) 34 Cal.App.4th 644, 657 (*Spann*); *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1202 (*Warren*).)

USC contends that an informed consent theory is unavailable in a wrongful life action. Assuming, without deciding, that Gabriel could appropriately seek relief based on USC's alleged failure to obtain informed consent, we have concluded below that reversal is not warranted due to the trial court's refusal to instruct on the theory. Thus, we do not address USC's argument that a wrongful life plaintiff may not pursue a failure to obtain informed consent theory of medical negligence as a matter of law.

A. What Was Disclosed

It was undisputed that Rubell and Bergero were informed of the risk that a child they conceived would be born with Fabry. Further, it was undisputed that Dr. Paulson told Rubell about her various options, and that the Kaiser geneticist also described Rubell's options to her. Rubell testified that Paulson mentioned gender selection, and Dr. Hughes discussed it with her, but neither recommended it. Rubell conceded that she and Bergero signed a written informed consent form that indicated that the likelihood of success for PCR could not be predicted and that the test could fail for a number of different reasons.[13] The parties stipulated that Hughes informed Rubell that PCR had a 3 to 5 percent error rate.[14] Moreover, Rubell and Bergero were informed,

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[13] We note that a written informed consent is not conclusive on the question of whether a doctor has obtained informed consent for a procedure. (*Quintanilla v. Dunkelman* (2005) 133 Cal.App.4th 95, 115-116.)

[14] On appeal, Gabriel contends that Rubell should have been told that the error rate for PCR was as high as 18 percent. This assertion was not supported by the evidence. Several experts testified that the reported error rate for PCR is 3 to 5

from several sources including USC, that PCR was a new and relatively untested technology. The evidence did not support a theory that Rubell and Bergero were not informed of the risk that PCR might not work as intended.

With this in mind, we turn to the specific information Gabriel asserts should have been disclosed and the evidence he contends supported an informed consent instruction. We must determine whether any error was prejudicial. We consider " 'the entire cause, including the evidence,' " and the following factors, as relevant: "(1) the state of the evidence, particularly conflicts on critical issues; (2) the effect of other instructions; (3) the effect of counsel's argument . . . ; (4) any indication by the jury that it was misled; and (5) the closeness of the verdict." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1313 (*Daum*).)

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percent, including Gabriel's expert. Gabriel's contention that the rate was much higher was based on a false assumption that was never supported at trial. Gabriel's counsel repeatedly posed a hypothetical to testifying experts to elicit testimony that if misdiagnosis due to DNA contamination occurred in 10 percent of all cases, the reported error rate should have been 13 to 15 percent, instead of 3 to 5 percent. The question was based on a stated assumption that the defense would assert that there is a 10 percent rate of misdiagnosis from DNA contamination. This assertion was never made. Defense expert Munne was the only expert to offer any opinion about the statistical rate of DNA contamination in PCR cases, and he testified only that there is a 10 percent rate of DNA contamination in embryos, *not* that there was a 10 percent rate of *misdiagnosis* due to DNA contamination. As a result, Gabriel's hypothetical that the PCR error rate should have been disclosed as 13 to 15 percent if DNA contamination was taken into account had no factual basis. On appeal, Gabriel asserts that the error rate was as high as 18 percent, but his citations to the record do not provide evidentiary support for this assertion.

Only Dr. Paulson testified that the PCR error rate might be as high as 10 percent. But to have found USC liable on an informed consent theory based on conflicting statements of the error rate, the jury would have to have credited Paulson's testimony about the error rate, but also *discredited* his testimony that he told Rubell that the error rate was as high as 10 percent. This is not a reasonably probable outcome.

B. Inexperience

Gabriel contends that the jury should have been instructed that USC could be liable for failing to inform his parents that it had only performed one or two IVF for PCR procedures before taking Rubell as a patient.

The following evidence was presented at trial. USC had only performed IVF for PCR one or two times before Rubell's case, but it had significant experience in IVF techniques generally. Dr. Hughes, indisputably an expert in PCR, praised Rubell and Bergero's choice of USC for the IVF portion of the procedure. USC worked with two experienced experts for parts of the procedure: Dr. Evsikov performed the single-cell biopsy and Hughes conducted the actual PCR analysis. In 2003, most IVF labs had only limited experience with IVF for PCR. Only one lab located in Chicago had significantly more experience. There was no evidence about the Chicago lab's 2003 practices or protocols.[15]

Expert testimony ranged from extremely general statements about inexperience to an opinion that USC's inexperience was not relevant to the outcome in this case. Plaintiff's medical expert, Dr. Wilcox, testified about his own experience in evaluating error rates related to the experience of a lab. He stated, "I can talk about my own lab and the experience of the people in it. Those just starting out make more mistakes than those that have been doing it a long time, especially with PCR." Wilcox was not describing IVF for PCR, but rather the PCR analysis, which in this case Dr. Hughes conducted, not USC.[16] With respect to the cumulus cell stripping, Wilcox testified that he was sure that USC had been performing ICSI for years. He indicated that although he did not know if Francis was experienced enough to strip away cumulus cells for ICSI in advance of PCR, he thought the USC protocols were appropriate for

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[15] There was testimony that the Chicago lab had reported that sample mix-up was its most frequent cause of error. There was no testimony about what time period the report covered or when it was issued.

[16] Dr. Wilcox testified that he had never performed IVF or run an IVF lab.

the process. Wilcox recalled that USC had only performed one or two IVF for PCR procedures, but he did not otherwise testify about USC's lack of experience as it related to Gabriel's birth with Fabry. Wilcox opined that USC had been negligent in failing to have proper procedures to avoid contamination and sample mix-up, but there was no evidence that more experienced IVF labs (as opposed to PCR labs) followed the procedures he described. Wilcox also testified that it would be standard to tell a patient about a limited amount of experience in the procedure.

Defense expert Dr. Munne agreed with plaintiff's counsel's general statement that "you learn to do things better the more times you do them," but offered no other testimony relevant to the issue of whether USC's lack of experience made Gabriel's birth with Fabry any more likely. Although Gabriel cites to Munne's testimony to support the assertion that evidence was adduced at trial linking a lab's inexperience with an increased rate of misdiagnosis in PCR, there was no such evidence. The portions of transcript Gabriel cites contain his counsel's questions to Munne attempting to elicit such a statement, but the court sustained objections to these questions.[17] Moreover, in the same cited colloquy, Munne testified that some labs had a higher DNA contamination rates than others, but stated: "in order to say that something – that there's a difference between 5 percent and 15 percent, it has to be what we call statistically significant, meaning that you need a good number of cases in each center to see if that difference is by lab or really there is something different." There was no testimony that the difference was in fact statistically significant.[18] Indeed, the only Munne testimony potentially helpful to Gabriel's point was the

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[17] In his reply brief, Gabriel asserts for the first time that the court erred in disallowing this portion of Dr. Munne's testimony, but he offers no discussion or legal argument for this assertion. To the extent that he intended to challenge the court's evidentiary rulings, we deem the issue waived. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

[18] In addition, Dr. Munne did not testify that some labs had between a 5 and 15 percent rate of *misdiagnosis* due to DNA contamination.

statement that in 2003 it was generally accepted in the PGD community that a two-person check was a best practice at the time of the single-cell biopsy.

Defense expert Dr. Cedars opined that USC's inexperience with IVF for PCR was not relevant since USC retained Dr. Evsikov to do the single-cell biopsy, which Cedars considered the part of the process that posed the greatest risk of damage to the embryo, getting an inaccurate diagnosis, and risk for contamination.

Francis, the embryologist, testified that she believed one needed a certain amount of time to do certain types of tests, and that "[i]t takes a certain amount of time to learn how to do a certain procedure." However, she also testified that she did not believe USC's lack of experience increased the risk for sample mix-up of embryos. Her general comments about the need for experience remained abstract. Dr. Paulson testified that he did not believe USC's inexperience with IVF for PCR increased the potential for DNA contamination because of USC's experience with IVF and ICSI, embryo transfer, and embryo culture in other cases. But he conceded that Rubell might have wanted to know about USC's limited IVF for PCR experience. He also stated he understood a patient might want to know that USC's IVF for PCR procedures were performed eight to 10 months apart.

Dr. Hughes testified that USC's inexperience would not affect the PCR test he designed, but could "affect the sample that was received." He did not testify further about the relevance of USC's inexperience with IVF for PCR to the eventual outcome of the case.

Finally, the jury concluded that USC was not negligent, despite USC's alleged inexperience in IVF for PCR.

There was some evidence to allow the jury to find that USC's inexperience was material information to be disclosed. But the jury also had to conclude that reasonable prudent parents would not have agreed to PCR had they known about USC's

inexperience.[19] In any informed consent case, "a physician is liable only where the failure to disclose *causes* the injury. [Citations.] 'There must be a causal relationship between the physician's failure to inform and the injury to the plaintiff. *Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given.*' [Citation.] Moreover, causation must be established by an *objective* test: that is, the plaintiff must show that reasonable 'prudent person[s]' in the patient's position would decline the procedure if they knew all significant perils. [Citations.]" (*Spann, supra,* 34 Cal.App.4th at p. 657.)

We do not believe it reasonably probable on this record that a jury would have found Gabriel established causation based on the inexperience theory.[20] USC had the approval of Dr. Hughes, the PCR expert. PCR was the only way to diagnose the embryos for Fabry and potentially avoid passing it on altogether. There was only one lab with significant amounts of IVF for PCR experience, and that lab was in Chicago. The jury never learned how that lab operated or if it differed in any respect from the way USC operated. The experts provided only the most general of statements from which the jury could infer that USC's inexperience even mattered in this case.

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[19] Gabriel requested CACI No. 533, which sets forth the essential elements of a failure to obtain informed consent claim. However, he also proposed a modified version of CACI No. 513 that incorporated the theory that USC failed to obtain informed consent because it did not disclose its inexperience. Without evaluating whether this proposed instruction was otherwise legally correct, we note that the evidence did not warrant the instruction. Gabriel would have had the trial court ask the jury to find USC liable if he proved that "[h]ad the proposed procedure been performed at a laboratory more experienced than that at USC, more likely than not a male child with Fabry disease would not have been born to Eve Rubell[.]" The evidence did not support such a finding.

[20] Rubell and Bergero testified that they would have wanted to know about USC's inexperience in IVF for PCR, and that they would have wanted a doctor with a lot of experience. However, we are concerned only with the *objective* test of what a reasonable prudent person in Rubell and Bergero's position would have done with the knowledge that USC had only conducted one or two IVF for PCR procedures. (*Warren, supra,* 57 Cal.App.4th at p. 1205.)

Moreover, in order to reach its verdict, the jury heard arguments of counsel and jury instructions on the issue of inexperience in a negligence context, yet concluded that USC's inexperience was not so significant that it violated the standard of care. Given the jury's 11-1 verdict that USC was not negligent, despite its alleged inexperience in IVF for PCR, it is not reasonable to conclude the jury would have found otherwise under this alternate theory.

Given the state of the evidence, we conclude that it is not reasonably probable that the outcome of the trial would have been more favorable to Gabriel had the jury been instructed on informed consent with respect to his inexperience theory.[21] Any error was not prejudicial. (*Ayala*, *supra*, 160 Cal.App.4th at p. 1361.)

C. FISH as an Alternative to, or in Addition to, PCR

Gabriel further contends that the court should have instructed the jury on informed consent in relation to his argument that USC did not properly advise Rubell and Bergero about alternative PGD procedures, namely FISH. We conclude that reversal is not warranted on this ground.

It was undisputed that USC did not recommend FISH to Rubell and Bergero. However, it was also undisputed that Dr. Paulson gave Rubell and Bergero some information about FISH, or gender selection, and that they also received information about the possibility of gender selection from their Kaiser geneticist and Hughes. Rubell knew that gender selection was an option, but she understood that Drs. Paulson

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[21] Gabriel contends that Dr. Paulson's letter to Kaiser affirmatively misrepresented USC's experience in IVF for PCR, and that this further demonstrates the failure to obtain informed consent. For our purposes, the letter presents the same issue as USC's conceded failure to tell Rubell and Bergero that it had only conducted IVF for PCR once or twice. We assume, without deciding, that the jury could have decided that inexperience was material information. Because we conclude that the evidence in this case did not support a finding that USC was liable for failing to disclose its inexperience under an informed consent theory, we do not address the arguments of USC and the amici that, as a matter of law, inexperience need not be disclosed in order to obtain informed consent.

and Hughes did not recommend it because, as an alternative to PCR, it would require discarding all male embryos, even if those embryos turned out not to have the Fabry gene. Rubell understood that FISH would not allow her to avoid giving birth to a girl with Fabry who might be affected by the disease or could pass it on to her own children. She further testified that Paulson did not recommend biopsying two cells because he indicated that it would adversely affect the viability of the embryo.

Gabriel contends that USC should have given Rubell and Bergero more detailed information about the comparative error rates of FISH versus PCR, the risks and benefits of FISH when compared with PCR, including the number of embryos likely to be "wasted",[22] and the possibility of conducting FISH in addition to PCR.

Yet, "under the doctrine of informed consent 'there is no general duty of disclosure with respect to *nonrecommended* procedures . . . .' [Citation.] Instead, 'the failure to recommend a procedure must be addressed under ordinary medical negligence standards. [Citation.]' [Citation.] That is, a physician must disclose alternative treatments only to the extent it is required 'for competent practice within the medical community.' [Citation.] The standard of care prevailing in the medical community must be established by expert testimony. [Citation.]" (*Spann*, *supra*,

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[22] Wastage concerns how many embryos must be discarded. It was undisputed that in FISH, it was estimated that 50 percent of all embryos would be discarded since the process would simply identify all male embryos to be discarded. Thus, as Dr. Hughes explained to Kaiser, since Rubell had a 25 percent chance of passing on Fabry, PCR would allow her to discard only the hypothetical 25 percent of embryos affected with Fabry, and to keep the remaining 75 percent, boy or girl. But when Hughes conducted PCR on the single cells from Rubell's six embryos, the process failed to produce results for two of them. Hughes testified that "15 percent of the time that we have samples, 15 percent of the samples will show no results." He also testified that the results in this case were not unusual. From this testimony, Gabriel argues that Rubell and Bergero should have been told that "the chemical analysis after replication fails to give any data 15-33% of the time, causing a loss of potential embryos for implantation during PCR as great as that found with FISH" and/or that "the recommended test, PCR, resulted in just as great a loss of potential implantable embryos as FISH (15-33% v. 25%)."

34 Cal.App.4th at p. 658, citing *Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064 (*Vandi*); *Parris v. Sands* (1993) 21 Cal.App.4th 187, 193 (*Parris*) ["Negligent failure to advise a patient to pursue a necessary course of treatment is an action under ordinary medical negligence"].)[23]

The trial court therefore did not err in refusing to instruct the jury on informed consent based on Gabriel's theory that more should have been disclosed to his parents about FISH. To the extent that Gabriel also argues that the trial court should have provided a specific instruction to the jury on negligence based on the failure to recommend FISH, we conclude that any error was not prejudicial.

To determine whether instructional error is prejudicial, we consider the entire record, including what other instructions were given, and the effect of the parties' arguments. (*Soule*, *supra*, 8 Cal.4th at pp. 570-571; *Daum*, *supra*, 52 Cal.App.4th at pp. 1313-1314.) In this case, the court instructed the jury on medical negligence principles. The jury received instruction on the elements of negligence, the standard of care for IVF physicians and embryologists, the duty of a hospital, and the essential elements of the wrongful life claim. The trial court also gave CACI No. 506 on alternative treatment: "An I[V]F physician and/or embryologist is not necessarily negligent just because he or she chooses one medically accepted method of treatment for diagnosis and it turns out that another medically accepted method would have been a better choice." Regarding the FISH argument, the only thing missing from these instructions was an explicit statement that diagnosis, care, and treatment—all terms used in the instructions—also included telling Rubell and Bergero about alternatives to PCR. The record does not indicate that this omission was prejudicial.

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[23] Only in the "unusual" case will the duty of disclosure extend to information about a nonrecommended procedure. (*Vandi*, *supra*, 7 Cal.App.4th at p. 1070; *Mathis*, *supra*, 11 Cal.App.4th at p. 342, fn. 6.) There was no evidence that made this such a case. (*Parris*, *supra*, 21 Cal.App.4th at p. 193.)

The theme of USC's failure to recommend FISH instead of PCR was repeatedly argued throughout the trial and in closing arguments as a component of USC's alleged negligence. At the beginning of Gabriel's counsel's opening statement, he argued that the jury would hear "that what needed to be done to prevent what happened here is simply to be able to tell a boy embryo from a girl embryo through testing. And that this type of testing had been available with an accuracy close to a hundred percent. Some of [the defense] experts will say he's done 9,000 of these and never mistaken a boy for a girl. They didn't use that test. The accurate test that had been available for 10 or 15 years, they chose not to recommend that." Throughout the remainder of the opening argument, counsel repeatedly argued that USC's negligence was in failing to recommend FISH instead of PCR.

Gabriel introduced evidence about the relative merits of FISH. Both sides also offered evidence about what the proper test was for Rubell's objectives. The parties also introduced expert testimony regarding the standard of care in recommending FISH and disclosing information about the procedure. Dr. Wilcox, plaintiff's expert, testified that it would be "standard" to describe all of the various options available to Rubell and Bergero and the risks and benefits of each. Dr. Cedars, a defense expert, testified that the recommendation of PCR instead of FISH, and the information USC disclosed to Rubell and Bergero about FISH, met the standard of care.[24] In closing arguments, Gabriel's counsel repeated this theme again. He fully presented his case

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[24] Similarly, there was significant testimony regarding the possibility of taking two cells from the embryo for testing, rather than one. Drs. Paulson, Cedars, Munne, and Wilcox testified that in the United States taking two cells from the embryo has been thought to reduce the viability of the embryo and the mother's chances of becoming pregnant. Gabriel's counsel elicited testimony from Munne that it is common in Europe to biopsy two of the embryo's cells for testing. However, the relevant testimony did not suggest that taking two of the embryo's cells is recommended or common practice among PGD specialists in the United States. Cedars testified that it was not the standard of care in the United States to take two cells from the embryo for testing. Dr. Evsikov also testified that his understanding was that it was standard to remove only one cell, rather than two.

and arguments on the theory. (*Betterton v. Leichtling* (2002) 101 Cal.App.4th 749, 757.)

Gabriel contends that the court's general instructions made it impossible for the jury to consider his arguments about USC's failure to recommend and describe FISH in great detail. We disagree that the court's general instructions had this effect. On the contrary, the court instructed the jury with CACI No. 5000: "I will now tell you the law that you must follow to reach a verdict. You must follow the law exactly as I give it to you even if you disagree with it. If the attorneys say anything different about what the law means, you must follow what I say." Gabriel's theory that USC was negligent for failing to recommend FISH was consistent with the remaining jury instructions, thus nothing in CACI No. 5000 required that the jury disregard Gabriel's counsel's arguments. Moreover, the court also gave CACI No. 5002, which informed the jury that while the attorneys' statements are not evidence, "what the lawyers say may help you to understand the law and the evidence[.]"

On the entire record it appears that the jury would well have understood that "negligence" included USC's alleged failure to recommend FISH instead of, or in addition to, PCR. We cannot conclude that it is reasonably probable that the jury would have rendered a different verdict had the court explicitly instructed that negligence included the failure to recommend an alternative test.

D. Risk of DNA Contamination, Sample Mix-up, and Insufficient Protocols

Gabriel additionally contends that an informed consent instruction would have allowed the jury to find USC liable for failing to tell Rubell and Bergero about the specific risk that DNA contamination and sample mix-up could cause a PCR misdiagnosis, and that USC had insufficient protocols for IVF for PCR. We find these arguments unavailing.

Gabriel's theory at trial was that USC's negligence caused his birth. He presented several possible scenarios that might explain his birth with Fabry: DNA contamination of the embryo due to USC's negligent failure to take appropriate

precautions; USC negligently implanted the wrong embryo; and the related claim that USC was negligent in failing to have protocols that would prevent contamination or sample mix-up. Gabriel's informed consent argument related to these theories was essentially that USC should have told Rubell in advance that it was going to be negligent. Since the jury ultimately concluded that USC was not in fact negligent, we cannot find that it would have also decided that USC's *potential* negligence was a significant risk that it should have disclosed to Rubell and Bergero.[25]

Moreover, the evidence at trial did not support the theory that USC was required to disclose information about its protocols, or the risk of DNA contamination and sample mix-up. In *Cobbs*, the court indicated that "the patient's interest in information does not extend to a lengthy polysyllabic discourse on all possible complications. A mini-course in medical science is not required[.]" (*Cobbs*, *supra*, 8 Cal.3d at p. 244; see also *Morgenroth v. Pacific Medical Center, Inc.* (1976) 54 Cal.App.3d 521, 531 (*Morgenroth*) [doctor's statement that procedure carried the risk of death or serious disease sufficiently explained a range of complications, including a stroke].) This general idea is applicable here, given the significant amount of detail describing each of these issues required, as borne out at trial. In addition, there was no evidence that a disclosure of these various issues would have been particularly meaningful information to Rubell, or to support a finding that had reasonable prudent parents known these were reasons PCR might produce an incorrect result, they would not have consented to the test.

Under a *Cobbs* analysis, these risks fall into the category of "additional information" rather than risk of death or serious complication. As such, USC was required to additionally disclose what a "skilled practitioner of good standing would

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[25] Dr. Cedars testified that some DNA contamination was unavoidable, and Dr. Evsikov also stated that it is impossible to completely eliminate the risk of contamination. But Gabriel repeatedly argued that the reported error rate suggested that DNA contamination was not an inherent or accepted risk of PCR, implying that only negligence would cause DNA contamination.

provide under similar circumstances." (*Cobbs*, *supra*, 8 Cal.3d at pp. 244-245.) Expert testimony relevant to this question was properly admitted at trial. (*Arato*, *supra*, 5 Cal.4th at pp. 1191-1192; *Morgenroth*, *supra*, 54 Cal.App.3d at pp. 534-535.) The defense offered uncontroverted expert testimony that the standard of care required that Gabriel's parents be informed of the risk of error in PCR, but *not* every possible source of that error. There was no testimony about whether a skilled practitioner in good standing would describe his or her protocols to a patient. Instead, there was only Dr. Cedars's general opinion that USC met the standard of care in its disclosures to Rubell.

Reversal is not warranted on this ground.[26]

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLSIHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

O'NEILL, J.[*]

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[26] In light of our conclusions above, we need not address USC's other arguments that Gabriel did not establish causation at trial.

[*] Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.